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IN THE

Supreme Court of the United States

October Term, 1967

No. 745

ARMAND F. ROBERGE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARMAND F. ROBERGE
Petitioner, Pro Se

223½ "K" Street
Hoquiam, Washington

METROPOLITAN PRESS — SEATTLE, WASH.

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Petitioner hereby petitions this Court for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Tax Court's Memorandum Findings of Fact and Opinion (Memo 1-1966; 1-R 198-206) are not officially reported. And United States Court of Appeals for the Ninth Circuit on Petition to Review a Decision of the Tax Court of the United States Tax Court decision. It was an affirmation of the lower court decision by the Circuit Court of Appeals, No. 21, 138, May 22, 1967.

JURISDICTION

This petition for review (I.R. 225-230) involves an alleged capital gain tax for the taxable year of 1961. The controversy arose from a complaint by Petitioner of excessive taxes for the year 1960.

On January 17, 1963, the Commissioner of Internal revenue mailed to taxpayer a notice of deficiencies in taxes for the years 1960 and 1961 in aggregate amounts of $1,569.20 (I.R. 5-9); within 90 days thereafter, on April 15, 1963, the taxpayer filed a petition with the Tax

Court for redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. The decision of the Tax Court was entered March 9, 1966.

The case was brought to the Circuit Court of Appeals for the Ninth Circuit, June 2, 1966, 225-230, within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954.

Jurisdiction was conferred by Section 7483 of the 1954 Code.

QUESTIONS PRESENTED

1. Was the Tax Court in error to have avoided the availability of evidence to prove intimidation by the opening statement of respondent and the subsequent material offered in brief and in letters together with the exhibits offered in Court? (Question of principal residence indicated by the voter's registration card of the Seattle Precinct Number 46-7/25/60.)

2. Was the Tax Court in error to limit Record of taxpayer if other information was necessary for the Court itself to make a judgment, for was it not the Court itself to make a judgment from the interrogation it made as agent of the Respondent?

3. Whether criteria determining the application of the intent of Congress as it pertains to Capital Gain distinguishes between a sale for cash and cash reinvested virtually the same in kind and in use so long as it is not sold in a short-term business transaction.

4. Whether part or all of construction constitutes a transfer, exchange, or replacement in kind and in use comes within the scope of the intent of Congress.

5. Whether a sale is for cash or an exchange by barter, is it the intent of Congress that the amount of cash reinvested (whatever amount), if it is within the amount of capital property sold with intent to reinvest in due time, it is tax-free. And is not this concept reenforced in specific instances where economic stress is a hardship?

6. Whether a person is rich or poor, is it the intent of Congress to have the Executive Branch of government devise techniques to bar individual appeals because of economic stress and because of the inability to finance well-organized defenses (if not well-organized legal prosecutions).

7. Whether "principal residence" is defined as the place where temporary employment is had, or is it the place where the petitioner lives if normal consideration of employment exists?

8. Whether criterion for principal residence is the place where one votes, the place where one has a permanent place to live (but where one is sometimes called out from time to time in rural areas) where one commutes to his permanently established principal residence. (This information could have been had by the IRS officials from King County, C. G. Erlandson, Comptroller and City Clerk, 114 County-City Building, Seattle, 1960).

9. Whether determination of "principal residence" was a guess on the part of the Court, or was it determined after the separation of the two properties to establish one as business and one as residence, regardless of the truth in reality?

10. Whether it is the intent of Congress to retain minimal reinvestment to encourage savings, initiative in sub-

marginal rentals and in sub-marginal residences where employment is often away from principal residence and voting residence as well as mailing residence.

11. Whether it is the intent of Congress to establish the policy of coercing taxpayers who challenge the validity of the unilateral application of exceptions for rentals and for residential real property?

12. Whether it is the intent of Congress to deprive low income groups of the legal protection that is afforded to those who first pay their taxes and then appeal to a District Court rather than to make appeal to the Tax Court without paying the taxes and run the risk of local income tax levies at the time of the trial to harass and to coerce and to prevent justice from being rendered.

13. Whether it is the intent of Congress to deny due process of law, the right to one's personal effects, and the enjoyment of his property without levies and confiscation while the propriety of executive action is being challenged in Courts.

14. Whether appreciation by physical labor (those labors beyond the normal requirements of a "good days work—8 hours) be construed as "capital gain," when reinvested, or simply not available. Is it the intent of Congress to tax regardless of the ultimate consequences to health of the taxpayer.

15. Whether Congressional intent or intent of Congress is to tax beyond reasonable ethical and moral standards, or to tax on the basis of facts and circumstances under the guidance of certain indexes, modes of living, or by other economic comparative norms that render equity according to the reality of a specific situation in which one is making a living.

16. Whether the intent of Congress was to make it

possible for the local IRS official and the Courts to avail themselves of all the necessary exterior data from reports and from other forms of established governmental units without the need to harass the taxpayer for proof, for more proof and "more probable evidence," when all the while all is available. (Record, reference to the Federal Register and the procedure to be used by the various sections of IRS.)

17. Whether definition of capital gain constitutes a "real gain," or an economic gain as interpreted in the Sayre case.

18. Whether City of Seattle zoning code of 1957 constituted involuntary conversion to a great degree as explained in the briefs. (See App.)

19. Whether the purchase by a private Company of the Petitioner's property constitutes a nongovernmental "threat", or a governmental threat even though purchased by a private company, Creative Solutions, Inc., (CA 5), 320 F.2d 809, creates a conversion that is involuntary.

20. Whether Sec 1031, 1033 and 1034 are applicable to the same property if affected by various situations and by various degrees of rental transfer, exchange, or replacement; conversion by replacement reinvested from sale as part cash to exchange (for whatever degree of invested capital for like kind and use).

21. Whether it was the intent of Congress that a "perfect specific situation" occurs wherein any one and only one of the above sections of the 1954 IRC is applicable, or if there are situations and instances that are variable and within the intent of Congress, but as a matter of routine and continuous evaluation to render equitable jus-

tice without having a statute for every situation that may arise.

23. Whether due process of law was denied by the Circuit Court of Appeals' failure to answer any of the issues submitted in the briefs and in the argument before the Court.

24. Whether the Tax Court and the Circuit Court of Appeals erred when they failed to consider the implications of the *Sayre* case and those of the *Kern* case in rendering their Findings of Fact, in rendering their opinion and in making their decision.

25. In view of the adamant position taken by Mr. Howard with Mr. Goodloe, the Petitioner's attorney, and in view of the open parcel of Petitioner's effects, and in view of the adamant position taken by the Respondent attorney in the pre-trial conference and in the pleading; was there a conspiracy within the executive department and within the Tax Court and pressure to have the Circuit Court of Appeal affirm the lower decision in four lines (one centimeter wide and ten and a half centimeter long).

STATUTES INVOLVED

IRC 1939, Sections 112 (b) 1, and 112 (n) and 1954 IRC, sections 1031, 1033, and 1034. The pertinent portions of the statutes related are either given in the Appendix, *infra* or in the briefs included with this Petition.

STATEMENT OF THE CASE

Armand F. Roberge the taxpayer had his principal residence at 455 N. 35th Street, Seattle, for the years 1960 and 1961. However, from time to time due to economic needs, employment was sought out of Seattle and into rural areas (it has been the policy of the Washington schools to hire people from urban areas to teach urban

children and to hire teachers from rural areas to teach children from rural areas. This policy might have been established by the fact that Petitioner was a migrant from North Dakota and not a native son in the year 1937).

However, Petitioner was a resident of King County for the years 1960 and 1961. This has not been questioned. It is a matter of record. During 1960, for a short time only, while City Light was repairing the penstock for the City of Seattle at Cedar Falls, a temporary room was rented during that time in Fall City. Part of the year of 1960 and 1961 was spent in Cle Elum, Washington. This again, was a temporary address while commuting to 455 N. 35th Street week-ends where week-ends were spent by Petitioner at his principal residence, 455 N. 35th.

Taxpayer, or Petitioner did not live at 12508 8th Place before June 5, 1961. (This corrects the confusion and the myth upon which Memo of the Tax Court was written, Memo 1-1966 and dated January 4, 1966.)

The Petitioner bought an acre, two half acre tracts with the intention of replacing 2120 E. 54th and 455 N. 35th at 12508-8th Place, Everett, Washington.

Replacement was to be effected by construction of new property (as building replacement). First the residential feature of the "package" property of 2120 E. 54th and 455 N. 35th was to take place on June 5th, 1961. This is what occurred and both moneys received in "cash" from the sale of 2120 E. 54th and from the sale of 455 N. 35th were invested in 12508 - 8th Place, Everett, Wash.

Prior to the determination for construction as replacement, replacement had been sought for the total equity from the sale of both properties and the purchase of another property from Pioneer Realty.

After June 5th, 1961, Petitioner lived in a partially completed residence (as did Mrs. Kern, in the *Kern v. Grandquist* (CA 9), 291 F.2d 29, affg 185 Supp 769). Petitioner lived at 12508 8th Place, in the replacement construction from June 1961 through August 1963. For a period of 18 months from June 5th (or one year after the taxing year). The part of the building that had taken place was for a principal residence. The other half acre was for the purpose of rental together with the lower portion of the residence for rental. This was begun but not completed for want of financing.

Prior to 1961, taxpayer owned two pieces of property which he held for rental and for the purpose of principal residence. One of these properties was located at 2120 E. 54th Street, Seattle, Washington. It was acquired on March 3, 1955 and sold in 1961.

Since taxpayer did not recover his adjusted cost basis in 1961, the parties agree that no capital gain was realized in that year on that sale.

The other rental and residential property was located at 455 N. 35th. It was purchased in 1947 and its value (capitalization) was $17,350.47.

In 1961 Taxpayer sold this property for $12,000. Some of this money was not reinvested immediately. However, lots were purchased and a building was erected at 12508 - 8th Place to make it livable by the end of June 1961. Reinvestment occurred gradually. (Hence the "no, no" answer in the Record pages 28 and 29 need clarification. This did not happen in the Record. It was stated that re-investment did occur, page 20 of the Record and the substance of the "no, no" answer of pp 28 and 29 were not given the chance to make the re-wording clear so that it

coincided with the truth and with reality. Clarity is established on page 20 of the Record as part of an overall context evaluation.

The Commissioner determined that taxpayer realized a long-term capital gain in the amount of $1,678.

Commissioner refused to consider both properties as replacement properties and to be treated as such in a "package" transaction.

Stipulations, after discovering what has happened to the parcel that was left to be in the custody of Mr. Goodloe were of questionable nature. Much has been forced upon the taxpayer without an inch of compromise and without a consideration for "exterior facts and data" to render a tax equitable under the prevailing circumstances. This was a specific situation. Relief was sought. It was denied. Years such as 1962 were poverty years. This led to alternate years as lean years such as 1966 with a little more than $3,000.00 income.

REASON FOR GRANTING WRIT

The primary reason for an application and for the granting of a writ is to have the Court define the basic underlying objectives of the present Internal Revenue Code as it pertains to adhering to the regulations as the intent of Congress and as it relates to the frivolities of executive action as it affects the local setting and the mode of life. Notwithstanding appeals, the Executive Branch of our government was making levies of the total salary of individuals, intruding into the the affairs of local employment of governmental units, and in some instances inquiring into the private and social life of the taxpayer.

Double standards, and an ignoring attitude by the Appeal Court makes of the Tax Court an Executive Court

available to those who can not pay the luxury of a District Court.

Therefore, decisions on appeal render the sense of justice of our Appeal Court callous and without concern about the economic factors and circumstances affecting the need for financing, selling, transferring and exchanging —not for profit, but to accelerate business transactions and to satisfy the economic needs of those endeavering to enhance their economic position.

The result of the adamant position of IRS as pointed out by the series of communications between taxpayer and IRS officials and Mr. Howard and Mr. Goodloe, taxpayer's attorney (before this attorney), all indicate the lack of concern by inexperienced IRS officials with personal rights and liberties such as the rights to one's effects, the right to one's property (even though broken up in parcels and into a variety of uses as residential and rental, depending on the economic need of the owner). Truly the need of all owners are not the same. It would be ridiculous to ask for a statute to treat all owners in an equitable way. The time for waiting would ultimately bar those who need equity and an evaluation that takes into consideration the mode of life which one leads. Relief is granted in conditions or situations of stress modes of human existence.

Creative executive action would then be necessary. This would prevent the opportunists who seek rank at the expense of justice rendered to the public and meted out according to the degree of economic stress.

In truth, in reality, the property at 2120 E. 54th and 455 N. 35th were both used as principal residences. This was dependent on the circumstances. When and how have

they been used? Not to provide relief for one who does shift around would be misplacing justice. It is not that a case has been misplaced, it is that justice has been mishandled for expediency.

IRS officials (including the Courts) as though there were no separation of powers, saw fit to disallow a principal residence at 455 N. 35th without attempting to piece information together or to find out the true facts about the case when opportunity arose.

In spite of the evidence such as place of mailing, voting registration, and the general practice that taxpayer had related about his principal residence. A myth was created. This must have been a conspiracy, or there must have been a prize, a rank to be granted as a favor to represent a fiction at a time when truth was available either from local governmental units or from the taxpayer himself.

Under circumstances, the "package" transaction would have been the only reasonable treatment. The taxpayer did not own anything else but that real estate. It would have been a substitute for either Social Security or Welfare, a modest protection, to say the least (a protection from such employment as was necessary to take in 1966, employment for which official of IRS would have refused).

Rather than allowing for this or other disadvantage economic status (such as one where the individual is required to take temporary employment), transportation deductions are allowed for one who has an established residence of 39 months. In 1964, taxpayer was disallowed transportation to Newport, Washington. Principal residence then was 12508 - 8th Place, Everett, Washington. The application, in this case, is in the reverse. Taxpayer

remained in Newport, voted there. Why did not the official of IRS and the Judge of the Tax Court use the same criterion for allowing or disallowing transportation costs? Why the double standard?

To work about the State periodically like a nomad is a disadvantage. And yet the non-nomadic get the transportation allowance.

The two sales, one for cash and one a purchase on a note were made in the same year to effect an exchange, or transfer (condemnation was not the reason for the sale, at least it was not the primary reason, involuntary conversion took place in the form of unfavorable zoning changes by the City of Seattle).

After failure to make an FHA loan for the exchange of both properties, 2120 E. 54th and 455 N. 35th for 5615 20th Avenue, N. E., taxpayer used parcel bought in 1961 to construct 12508 - 8th Place, Everett, Washington. Both Respondent Counsel and Judge were so ill informed about 12508 - 8th Place, Everett, Washington, that they have given the impression that it really existed before June 5, 1961, to be exact. It does now exist, but it has been treated by two Courts as a place that does not comply with the Law, therefore, computation need not be presented. *Kern v. Granquist* (CA9) 291 F.2d 29, aff'g 185 F. Supp 769. Refer: Petitioner's Brief, Docket 1555-63.

In the Findings of Fact, and in the opinion, the Tax Court, 1555-63, and Memo 1-1966, there was a great clamor for "probative authorities" to allow the equity of a partially constructed building tax-exempt, and yet, the *Kern* case and its merits were not mentioned at all in the documents of the Tax Court. And the Circuit Court of Appeals affirmed all of what the Tax Court rendered in

four short lines. It is well to call attention to the reference to the *Sayre* case as a case *misplaced* when referred to a case relating to both an exchange and a replacement. It would have taken no other cases for a creative Court to have rendered a decision encompassing all the implications involved.

The *Sayre* and the *Kern* cases were the two cases that rendered all aspects of the instant case in true perspective.

And whatever was reinvested in the period of 18 months as allowed in the *Kern* case for a partially constructed house (a principal residence), so it should be allowed in the case of the taxpayer.

In the leading case cited by Respondent in CA (No. 21, 138, (9th Cir.) *Rogers v. CIR*, the Petitioner is executor for the deceased, Gladys B. Rogers, and only one condition seems to prevail as a question of law, "Did both parties intend to have this transaction a transfer of holdings?" This was not a specific situation wherein economic stress and inability to pay taxes prevailed. Loans were made to cover the transaction. Moreover, how could there be a mutual "intention" in both the instant taxpayer's case and Mrs. Kern's case where contractors and material men did the construction?

The nature of the property certainly is not of the type to be compared with those holdings of the taxpayer. Market Street property in San Francisco is not to be compared with the Fremont District property in Seattle and evaluated from Washington, D. C.

The "intent" test of taxpayer is only valid when purchase is made for an exchange with the seller. The seller

need not exchange as barter, nor need the sale be solely "in kind" for the total and exact amount or for the sole use. This equitable variable is part of the legal process for it is reality, it is varieties that exist in everyday life. Congress can not be asked to make a statute so that every transaction has a pattern in which to fit.

CONCLUSION

The reason for which a Writ should be granted stems from the extra-ordinary power of IRS officials which, apparently, cannot be checked by its own branch of government.

If the Executive Branch of Government cannot protect the basic economic need for the individual to be secure in his personal effects and to enjoy his property and his work without having intrusions that jeopardizes his position and his whole mode of life, is it not the duty of the Court to limit the unharnessed power into areas where specialists and special analyses are necessary to effect good government?

If the American Civil Liberties Union, or the American Bar Association, Labor Unions, Teacher Organizations cannot discipline the community to protect the basic rights as protected by the first ten Amendments of the Constitution we must resort to the Courts and to the individuals in politics who will support and uphold a strong position in favor of the Separation of Powers.

Respectfully submitted,

ARMAND F. ROBERGE
Petitioner, Pro Se

APPENDIX A

T. C. Memo. 1966-1

TAX COURT OF THE UNITED STATES

ARMAND F. ROBERGE,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 1555-63
Filed January 4, 1966

Gain on sale of rental property for cash recognized. Sections 1031, 1033, and 1034, I.R.C. 1954, not applicable.

Armand F. Roberge, *pro se.*

Eli Blumenfeld, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DRENNEN, *Judge*: Respondent determined deficiencies in petitioner's income taxes for the years 1960 and 1961 in the amounts of $546.93 and $1,022.27, respectively. All issues except one have been conceded or agreed upon by the parties.[1] The one issue remaining for decision is whether gain realized by petitioner on the sale of a building and lot located at 455 North 35th Street, in Seattle, Wash., in the year 1961 is to be recognized. Respondent concedes that there is no deficiency in petitioner's income tax for the year 1960.

1. Petitioner concedes that he received interest income in the amount of $514.71 and additional salary in the amount of $223.32 in the year 1961. Respondent concedes that petitioner incurred and paid deductible rental expenses in the amount of $450 in 1960. Respondent also concedes that the useful lives for computing depreciation on petitioner's two rental properties, and the improvements thereon, are 15 years.

FINDINGS OF FACT

The facts stipulated are so found and are incorporated herein by reference.

Petitioner is a single man who resided in Cle Elum, Fall City, and at 12508 Eighth Place, Everett, Wash., during the years 1960 and 1961. He filed original income tax returns for the calendar years 1960 and 1961 with the district director of internal revenue, Tacoma, Wash. The office of the district director of internal revenue, Seattle, Wash., received an amended return for 1960 and two amended returns for the year 1961 from petitioner. Petitioner's primary occupation during the years involved was teaching school.

On April 4, 1947, petitioner acquired a building and the land on which it is located at 455 North 35th Street, Seattle, Wash., for a purchase price of $4,250 with the intent of converting this property into a duplex for rental purposes, which objective was accomplished. Petitioner made improvements and additions to the above property during the years 1947 through 1959 in the total amount of $14,196.49 as shown in the stipulation of facts.

On March 3, 1955, petitioner acquired a building and the land on which it is located at 2120 East 54th Street, Seattle, Wash., for a purchase price of $10,431.64 with the intent of converting this property into a duplex for rental purposes, which objective was accomplished. Petitioner made improvements and additions to this property during the years 1955 through 1957 in the total amount of $4,242.50, as shown in the stipulation of facts.

The correct useful life for each of the above rental properties for purposes of computing depreciation thereon

is 15 years from the date of acquisition thereof by petitioner.

In 1961 petitioner sold the rental property located at 455 North 35th Street, Seattle, Wash., to Seattle Disposal Co., a private corporation, for $12,000 cash.

In 1961 petitioner sold the rental property located at 2120 East 54th Street, Seattle, Wash., for a sales price of $15,000. Petitioner received a down payment consisting of a boat and $600 cash. The real estate contract under which this property was sold provides that the balance of the purchase price in the amount of $13,000 was to be paid at the rate of $100 per month beginning on May 25, 1961. The parties hereto agree that this real estate contract was not negotiable, nor was it the equivalent of cash, and that no capital gain was realized on this sale in 1961 because petitioner did not recover his adjusted cost basis in that year.

In 1961 petitioner purchased land at 12508 Eighth Place, Everett, Wash. This land is contiguous to land purchased by petitioner in 1957. By 1962 petitioner had constructed some sort of a frame building on this property.

In the notice of deficiency respondent determined that petitioner realized a long-term capital gain in the amount of $1,678 on the sale of the property located at 455 North 35th Street, Seattle, Wash.

OPINION

We gather from petitioner's testimony and his briefs that he contends, first, that he actually realized no gain on the sale of the property at 455 North 35th Street, Seattle, Wash., and secondly, that if he did realize a gain on the sale in the year 1961 such gain was not recogniz-

able for tax purposes under sections 1031, 1033, and 1034 of the 1954 Code, or a combination thereof. Unfortunately petitioner has submitted no probative evidence and has directed our attention to no authorities in support of his position.

The parties have stipulated the original cost of the property to petitioner, the cost to petitioner of all improvements and additions thereto, the useful life of the property for purpose of depreciation and the depreciation allowable thereon during the period the property was held by petitioner, and the sales price. No additional evidence was offered by either party which would enter into the computation of petitioner's gain, if any, on the sale of this property. The amount of the gain can therefore be correctly computed by the parties under Rule 50 from the stipulated facts. Counsel for respondent stated in his opening statement that the gain would not exceed the amount of gain determined in the notice of deficiency.

Petitioner's claim that he actually realized no gain, or very little gain, on the sale of this property is apparently based on the theory that because he had to use most of the cash proceeds from the sale to pay off indebtednesses against the property, no gain was realized. Of course this theory is incorrect; petitioner's gain on the sale for tax purposes was the excess of the amount realized therefrom over his adjusted basis in the property. Sec. 1001, I.R.C. 1954. Furthermore, petitioner offered no evidence concerning the specific disposition of the proceeds from the sale.

Petitioner's legal argument seems to be that the two properties he sold in 1961 should be considered as one package, being property used partially for rental or in-

vestment purposes (presumably 455 North 35th Street) and partially for his personal residence (presumably 2120 East 54th Street), with the proceeds from both sales being reinvested in the property at 12508 Eighth Place, Everett, Wash., which he intended to use partially for his personal residence and partially for investment purposes and, therefore, any gain he realized on the sale of the two properties should not be recognized under sections 1031, 1033, and 1034, I.R.C. 1954.

Section 1031 provides that no gain or loss shall be recognized if property held for investment is exchanged solely for property of a like kind to be held for investment. Petitioner testified that the property located at 455 North 35th Street, Seattle, Wash., was rental property and it was sold for cash. There was no exchange of properties. Consequently, section 1031 is not applicable to avoid recognition of gain.

Section 1033 provides in substance that if property (as a result of condemnation or threat or imminence thereof) is involuntarily converted into property similar or related in service or use to the property so converted, no gain shall be recognized. Not only is there no evidence that would permit a finding that the property located at 12508 Eighth Place, Everett, Wash., was similar or related in service or use to the property at 455 North 35th Street, Seattle, Wash., but there is also no evidence that the Seattle property was involuntarily converted. The Seattle property was admittedly rental property. There is very little evidence as to just what use was made of the property in Everett except that it is stipulated that petitioner resided at that address in Everett, among other places, during the years involved in these proceedings.

Petitioner argues that because Seattle Disposal Co. moved into the area this was tantamount to an involuntary conversion. However, there is no evidence that Seattle Disposal Co. had any powers of condemnation, and petitioner admits that his sale was entirely voluntary. Section 1033 is not applicable.

Section 1034 provides in substance that if property used by a taxpayer as his personal residence is sold by him, and, within a period beginning 1 year before the date of such sale and ending 1 year after such date, property is purchased and used by the taxpayer as his principal residence, gain from the sale of the old residence shall be recognized only to the extent that the taxpayer's adjusted sales price of the old residence exceeds his cost of purchasing a new residence. It is clear that petitioner was not using the property at 455 North 35th Street, Seattle, Wash., as his residence at the time of the sale and consequently section 1034 has no application to that sale. There is some evidence to indicate that petitioner may have been residing at 2120 East 54th Street, Seattle, Wash., at the time that property was sold but the parties have agreed that no gain was realized by petitioner on that sale during the year 1961, so the question of whether section 1034 would apply to any gain on the sale of the latter property is not before us and we reach no conclusions with respect thereto.

We find no justification for petitioner's apparent attempt to combine the use of sections 1031 and 1034 to obtain nonrecognition of his gain on the sale of the property at 455 North 35th Street, Seattle, Wash. Each of those sections was enacted to provide relief in the specific circumstances covered therein and there is no authority for

combining two separate transactions to gain partial nonrecognition of gain under one section and nonrecognition of the remaining gain under the other section. Petitioner's reliance on *Sayre v. United States*, 163 F. Supp. 495, is misplaced. There the taxpayer exchanged property on which was located both a farm and his personal residence for another farm and $15,200 cash "boot." He reinvested a part of the cash in another personal residence and claimed that part of the boot was nontaxable. The question before the court was really as to the allocation of the cash received in the exchange between the residence and the farm. Here there were two separate and independent sales and the only one upon which gain was realized was the sale of investment property for cash.

Decision will be entered under Rule 50.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARMAND F. ROBERGE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 21138

[May 22, 1967]

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Before: BROWNING, DUNIWAY, and ELY, Circuit Judges

PER CURIAM:

We have examined the record in the light of petitioner's arguments and conclude that the judgment must be affirmed for the reasons stated in the opinion of the Tax Court. T. C. Memo 1966-1.

APPENDIX C

Petitioner's Communication Prior to Tax Court Appeal

Place of Residence in 1960
Supported by Ltr from Hughbanks Incorporated and dated February 11, 1960, addressed to 455 N. 35th

Certified Mail addressed to 12508 8th Place, Everett, Washington, dated April 11, 1962.

Note: To prove mailing address, other proof is place of voting and principal residence

Letters and Registry Receipts to establish connection between parcel that was mailed in Newport, Washington, for taxpayer-counsel conference, but due to adamant position of Mr. Howard, Mr. Goodloe withdrew from the case.

Tax Case Reply Brief – 1555-63

Substance of Argument before the Court of Appeals (In Writing) Case No. 21, 138

Other Documents:
T. C. Memo 1966-1

Findings of Fact and Opinion, January 4, 1966 Decision that followed

United States Circuit Court of Appeal on Petition to Review a Decision of the Tax Court

Simply: Affirmed (four lines)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 745

ARMAND F. ROBERGE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question here is whether the Tax Court and the court of appeals correctly rejected petitioner's claim that the gain he realized on the sale of a building and lot located at 455 North 35th Street, in Seattle, Washington, should not be recognized for purposes of the federal income tax. Those courts rejected petitioner's alternative arguments that the transaction was an exchange of property of "like kind," (see Section 1031 of the Internal Revenue Code of 1954), an "involuntary conversion" (see Section 1033), or the sale of his residence followed within a year by a purchase of another residence (see Section 1034 of the Code).

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On April 4, 1947, petitioner acquired a building and the land on which it is located at 455 North 35th Street, Seattle, Washington, for $4,250. He converted this property into a duplex and rented it. He made improvements and additions to this property during the years 1947 through 1959 in the total amount of $14,196. (Pet. A2; I–R. 48.) Depreciation was allowed on the property on the basis of a 15-year useful life (Pet. A2–A3; I–R 48, 49, 50–51).

In 1961, petitioner sold the 35th Street property to Seattle Disposal Company, a private corporation, for $12,000 cash (Pet. A3; I–R. 50–51). In the same year he sold other Seattle property, on 54th Street, for $15,000, payable in installments. Also in 1961, he purchased land at 12508 Eighth Place, Everett, Washington, and constructed a residence on it. (Pet. 8, A3; I–R. 51.)

The Commissioner of Internal Revenue determined that the taxpayer realized a long-term capital gain on the sale of the 35th Street property (Pet. A3; I–R. 8). No gain was realized on the 54th Street transaction in 1961 because petitioner did not recover his adjusted cost basis in that year (Pet. A3; I–R. 51, 52, 76). Petitioner concedes he had gain on the 35th Street property, but has contended throughout that he is entitled to nonrecognition treatment. In a proceeding for redetermination, the Tax Court upheld the Commissioner's position on the 35th Street property, resulting, after certain stipulated adjustments, in a decision that there was a deficiency in income tax due for 1961 in the amount of $941 (Pet. A1, A4; I–R. 224). Upon petitioner's appeal, the court of ap-

peals affirmed *per curiam* "for the reasons stated in the opinion of the Tax Court." (Pet. A8.)

The decision below was correct and there is no conflict of decisions or any other basis for further review by this Court.

1. Section 1031(a) postpones recognition of gain where property held for productive use or investment is exchanged for like-kind property. It is the evident theory of petitioner that his sale of the property at 455 North 35th Street and his subsequent purchase of property at 12508 Eighth Place in the same year should be treated as an *exchange* for purposes of the statute. But where a sale occurs, however soon it may be followed by a reinvestment in similar property, it does not qualify. *Coastal Terminals, Inc.* v. *United States,* 320 F. 2d 333 (C.A. 4); *Trenton Cotton Oil Co.* v. *Commissioner,* 147 F. 2d 33 (C.A. 6); *Rogers* v. *Commissioner,* 377 F. 2d 534 (C.A. 9).

2. Section 1033(a) has no application to this case because there is no evidence that petitioner's sale of the property at 455 North 35th Street was anything other than what it purported to be—a voluntary sale to a private corporation for cash. (Pet. A5; I–R. 204.) In order to qualify for non-recognition of gain under that portion of Section 1033(a) relating to condemnation and requisition—on which petitioner relies—a taxpayer must show that some governmental authority either instituted condemnation proceedings or threatened to do so. *Hitke* v. *Commissioner,* 296 F. 2d 639 (C.A. 7); see also, *Dear Publication & Radio, Inc.* v. *Commissioner,* 274 F. 2d 656 (C.A. 3). That a mere

change in zoning may have resulted in petitioner's decision to sell is not enough.

3. A complete bar to petitioner's claimed qualification under Section 1034 is the finding of the Tax Court that the 35th Street property was not his principal residence at the time of sale (Pet. A6; I–R. 205). The finding here is supported by substantial evidence, including a stipulation that petitioner lived at other places in 1961, that he taught school in another town (Cle Elum), and that on his federal income tax returns he treated the property as rental and investment property (I–R. 47, 48, 51, 70). The question of what constitutes a taxpayer's principal residence depends, of course, upon all the facts and circumstances, *e.g.*, *Biltmore Homes, Inc.* v. *Commissioner*, 288 F. 2d 336, 342 (C.A. 4), certiorari denied, 368 U.S. 825. The Tax Court's resolution of the issue, reinforced by the court of appeals' affirmance, should not be overturned.

4. Finally, as the Tax Court concluded (Pet. A6–A–7; I–R. 205–206), there is no merit in petitioner's attempt to qualify for relief under the novel theory that Sections 1031 and 1034 should be viewed as operating in tandem. Invoking a set of facts that the Tax Court refused to accept, petitioner argues that both the property at 455 North 35th Street and that at 2120 East 54th were used for residential as well as investment purposes, and that he disposed of both in order to purchase the property at 12508 Eighth Place, Everett, Washington, to be used as his principal residence and also for rental and investment purposes (Pet. 10–12). Apart from the fact that there is no

authority or reasonable basis for combining Section 1031 and Section 1034 to provide relief in circumstances not covered by either of them, the dispositive conclusion of the Tax Court is that in this case "there were two separate and independent sales and the only one upon which gain was realized was the sale of investment property for cash" (Pet. A7; I–R. 206).

The petition for certiorari should be denied.

Respectfully submitted.

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